United States Court of Appeals

for the Second Circuit

APPENDIX

75-7333

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7333

B

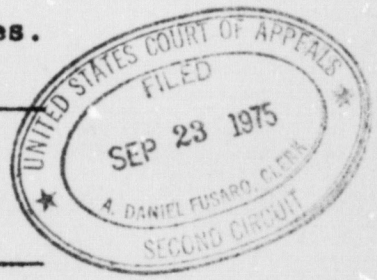
JANE MONELL, et al.,

Plaintiffs-appellants,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Defendants-appellees.



APPENDIX

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TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JANE MONELL, SUSAN TERRALL, and BEVERLY ZAPATA, on their own behalf and on behalf of all others similarly situated,

Plaintiffs

-against-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK; JULE SUGARMAN, as Director of the Department of Social Services; BOARD OF EDUCATION OF THE CITY OF NEW YORK; HARVEY SCRIBNER, as Chancellor of the Board of Education of the City of New York; and JOHN LINDSAY, as Mayor of the City of New York,

Defendants

Civil Action No. 71 Civ. 3324

COMPLAINT-CLASS ACTION

I. PARTIES

A. Plaintiffs

1. JANE MONELL is a citizen of the State of New York and of the United States. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Monell was employed as a Supervisor at the Bureau of Child Welfare, Department of Social Services of the City of New York.

2. SUSAN TERRALL is a citizen of the State of New York and of the United States. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Terrall was employed by the Board of Education of the City of New York as a teacher of English as a second language in the Work Incentive Program

for Adult Education. Prior to said involuntary leave of absence Ms. Terrall had been employed as a teacher for 10 months in the Work Incentive Program with a junior high school provisional regular license.

3. BEVERLY ZAPATA is a citizen of the State of New York and the United States. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Zapata was employed by the Board of Education of the City of New York as a teacher of basic education courses in the Work Incentive Program. Prior to her compelled leave of absence, she had been employed as a teacher in the Work Incentive Program with a Regular Common Branches License.

4. Plaintiffs sue on their own behalf and on behalf of all other women similarly situated who have been, are or will be, arbitrarily and capriciously compelled to take an unpaid leave of absence from their employment srlely because of their pregnancy when they wished to andwere physically capable of continuing to work.

B. Defendants

5. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK is a department of the city government under its charter, and is authorized to hire and grant leave to its employees subject to the by-laws of the City of New York and of the Department of Social Services.

6. JULE SUGARMAN is the Director of the Department of Social Services.

7. The BOARD OF EDUCATION OF THE CITY OF NEW YORK is a department of the city government under its charter charged with maintaining the public school system for the City. It is

authorized to hire and grant leave to its employees subject to its by-laws.

8. HARVEY SCRIBNER is Chancellor of the New York City Board of Education.

9. JOHN LINDSAY is the Mayor of the City of New York.

10. Defendants are sued in their official capacity.

JURISDICTION

11. Jurisdiction over this action arises under 28 U.S.C. 1343(3) and (4), 3301 et seq., 42 U.S.C. 1981 et seq. and the Constitution of the United States, in particular, the First, Ninth and Fourteenth Amendments.

CLASS ACTION ALLEGATIONS

12. Plaintiffs sue on their own behalf and on behalf of all others similarly situated pursuant to Rule 23(b)(c) and (3) of the Federal Rules of Civil Procedure. Defendants have acted on grounds generally applicable to theclass, thereby making appropriate final injunctive relief with respect to the class.

13. Plaintiffs represent, on information and belief, over one thousand women who are City employees, either of the Board of Education or the Department of Social Services, or other city agencies who have been, are or will be arbitrarily compelled to take an unpaid leave of absence from their employment solely because of their pregnancy when they wished to and were physically capable of continuing to work. In bringing this action, these women are exercising their rights under the First, Ninth and Fourteenth Amendments to the United States Constitution, in particular, their rights to bear children and remain full, active

and equal members of society without the arbitrary and capricious interference of their employers. All of these women wish to make the private determination of when to terminate their employment because of their pregnancy without the arbitrary interference and unreasonable discrimination of City compulsory maternity leave policies which deprive them of their civil rights under color of law. The members of the class are so numerous that joinder of all of them is impracticable.

14. Plaintiffs are women who have already had their employment unconstitutionally terminated because of City policies of compulsory maternity leave, but sue on behalf of all other women, for whom questions of law and fact would be the same. Plaintiffs adequately and fairly represent all members of the class since all women city employees are, have been, or would be subject to the unconstitutional policies of compulsory maternity leave.

15. Plaintiffs know of no conflicts of interest among the members of the class.

16. Plaintiffs claims are typical of the claims of the class.

17. There are questions of law and fact common to the class concerning whether Board of Education By-Law 8107, and Department of Social Services Policy as they relate to compulsory maternity leave for women employees are constitutional on their face and as applied by de endants in violation of the First, Ninth and Fourteenth Amendments.

18. The questions of law and fact common to the members of the classes predominate over any questions affecting only individual members. A class action is superior to other availabl

means for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in the management of a class action.

CAUSE OF ACTION

19. On February 22, 1971, plaintiff Monell requested maternity leave to commence March 8, 1971, from her Supervisor, Ms. Sydnor. Her request was submitted with a letter from her person physician, stating that her expected date of delivery was April 17, 1971.

20. On February 24, 1971, plaintiff Monell was informed she must leave work on Friday, February 26, 1971, as she was already in her eighth month of pregnancy.

21. On February 25, 1971, plaintiff Monell protested the forced termination date in a memorandum to Irving Domsky, Director, Department of Personnel, Bureau of Child Welfare, Department of Social Services. In this memorandum she requested that her leave be effective March 29, 1971, and further offered to sign a waiver of liability and secure a note from her physician verifying her physical good health if permitted to continue to work. Receiving no reply to said memorandum, on February 26, 1971, Ms. Monell left work as directed.

22. On or about March 10, Ms. Monell received a letter from Inez Simon, Division of Personnel Relations, Department of Social Services, Bureau of Personnel Administration, re-confirming that her request to continue work until March 29, 1971, had been denied and indicating that the denial was based on a department

policy permitting staff members to work through the seventh month of pregnancy with the approval of their Bureau Physician. The letter also noted that under city-wide leave regulations pregnant employees are permitted to work only until the completion of the fifth month of pregnancy unless they receive "agency medical approval" and approval of the head of the agency by whom they are employed. [See letter, Appendix A annexed herto and made a part hereof.]

23. In January 1971, plaintiff Susan Terrall requested maternity leave to commence on April 1, 1971, from her then supervisor Ms. Vilma Alverez. Her request was accompanied by a note from her obstetrician, Dr. Leonard Elmaleh stating that she could work until April 1, 1971. In establishing the date of April 1, Dr. Elmaleh, indicated to plaintiff Terrall that there was no medical reason why she could not work as long as she wished. Plaintiff Terrall indicated she wished to work until April 1. Plaintiff Terrall's expected date of delivery was April 22, 1971. When plaintiff Terrall was transferred from the San Juan Center to St. Anselm's School her request was transferred to her new supervisor, Murray Liebman.

24. During the second week in January 1971, plaintiff Beverly Zapata requested maternity leave to commence on April 1, 1971, from her superyisor, Murray Liebman. Her request was accompanied by a note from her obstetrician, Dr. Eulogio Jerez stating she could work until March 15, 1971. Dr. Jerez indicated to plaintiff Zapata without further explanation that he had chosen the March 15th date for "legal" not medical reasons. The note indicated that plaintiff Zapata's expected date of delivery was April 11, 1971.

25. Plaintiffs Terrall and Zapata were told by Mr. Liebman that they must have a physical examination done by the Board of Education Physician.

26. On March 1, 1971, they went to the Board of Education on Court Street, Brooklyn, New York, as directed. At the physical examination their blood pressure was taken, the doctor felt the size of their babies and noted the due dates indicated by their obstetricians. The Board of Education doctor then informed plaintiffs Terrall and Zapata that since they were past their seventh month of pregnancy they were supposed to stop work immediately but that they could complete the week.

27. Plaintiffs Terrall and Zapata both worked until March 5, 1971.

28. On information and belief the policy of the Board of Education requires that pregnant employees stop work at the completion of the seventh month of pregnancy. On information and belief the only exception to that policy occurs when the eighth month of pregnancy occurs durin ghe last month of the school term. Under those circumstances the employee may work until the end of the term. On information and belief this arbitrary policy is purely for the convenience of the Board of Education and in no way relates to the need of the employee.

29. The policies of defendant Department of Social Welfare and defendant Board of Education in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy are in violation of plaintiffs' rights to liberty and property guaranteed under the Fourteenth Amendment.

30. The policies of defendant Department of Social Welfare and defendant Board of Education in arbitrarily requiring plaintiffs to stop work at the completion of the seventh month

of pregnancy discriminate against plaintiffs on the basis of their sex in that the policies are wholly without medical basis and establish arbitrary limits on their employment or pregnant women in violation of their rights under the equal protection of the laws guaranteed by the fourteenth Amendment to the United States Constitution.

31. The policies of defendant Department of Social Welfare and defendant Board of Education in arbitrarily requiring plaintiffs to stop work at the completion of the seventh month of pregnancy violates plaintiffs rights to have and raise a family without the imposition of unconstitutional condictions by defendants as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution.

32. The policies of defendant Department of Social Welfare and defendant Board of Education in arbitrarily requiring plaintiffs to stop work at the completion of the seventh month of pregnancy chill and deter and discourage plaintiffs and the class they represent in the exercise of their rights under the First, Ninth and Fourteenth Amendments to have and raise a family

33. If plaintiffs are not granted the relief they request, immediate and irreparable harm will befall not only the plaintiffs, but all others who are chilled and deterred from exercising their constitutionally protected rights to have and raise a family.

34. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court grant the following relief:

1. That a declaratory judgment issue declaring that the policies of defendants Department of Social Welfare and Board of Education compelling female employees to take a leave of

absence at the completion of their seventh month of pregnancy are unconstitutional and in violation of:

(a) the right to earn a livelihood, to be full and active members of the society and to decide whether to have children guaranteed by the Fourteenth Amendment to the Constitution

(b) the right to the equal protection of the laws guaranteed by the Fourteenth Amendment;

(c) the right to have and raise a family without the imposition of unconstitutional conditions guaranteed by the First, Ninth and Fourteenth Amendments.

2. That an injunction issue prohibiting and enjoining defendants, their agents, employees, attorneys or any other active on their behalf, from further enforcing the aforesaid policy requiring employees to take a leave of absence at the completion of their seventh month of pregnancy.

3. That an order be entered awarding compensatory damages for pay denied them during their unconstitutionally compelled leave of absence in the following amounts:

(a) plus interest and costs for plaintiff Nonnell

(b) plus interest and costs for plaintiff Terrall

(c) plus interest and costs for plaintiff Zapata.

4. And for other and further relief which this Court deems appropriate.

Respectfully submitted,

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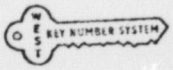
Attorneys for Plaintiffs

book, but also individual items in the "Textures & Stripes" line, and Josephson's advertisements for the "Textures & Stripes" line. These contentions are wholly without merit: a mere visual inspection reveals that the covers of "Textures & Stripes" and "stripes & textures" look very different; the patterns in each are distinguishable; and the advertisements bear no similarity to each other. (Josephson's exhibits E and H.)

Josephson also makes conclusory allegations that General Tire was attempting to deceive the public into believing that its product was manufactured by Josephson. There is no factual basis to the assertion that General Tire was deceiving customers, or that it was in any way appropriating Josephson's property rights. Hygienic Specialties Co. v. H. G. Salzman, Inc., *supra*, 302 F.2d at 620; Lincoln Restaurant Corp. v. Wolfies Restaurant, Inc., 291 F.2d 302, 303 (2d Cir. 1961), cert. denied, 368 U.S. 889, 82 S. Ct. 143. 7 L.Ed.2d 88 (1961); Norwich Pharmacal Co. v. Sterling Drug, Inc., *supra*, 271 F.2d at 571.

Josephson's motion for a preliminary injunction is accordingly denied.

So ordered.



Jane MONELL et al., Plaintiffs,

v.

DEPARTMENT OF SOCIAL SERVICES OF the CITY OF NEW YORK et al., Defendants.

No. 71 Civ. 3324.

United States District Court, S. D. New York.

April 12, 1972.

Female employees of city board of education and department of social services, on behalf of themselves and others similarly situated, brought action against city agencies challenging rules and regulations which were claimed to arbitrarily compel pregnant women employees to take unpaid leaves of absence. The District Court, Motley, J., held that question of fact existed as to whether women employees were compelled in every case to leave their employment at seventh month of pregnancy except when eighth month of pregnancy occurred during last month of school term or whether individualized medical judgment was made in each case, thus precluding summary judgment, It was further held that action was maintainable as a class action.

Order accordingly.

1. Courts ⇐281(4)

District court had subject matter jurisdiction of civil rights action filed by female employees of city board of education and department of social services challenging rules and regulations of city agencies which plaintiffs claimed arbitrarily compelled pregnant women employees to take unpaid leaves of absence even if they desired to and were capable of continuing to work beyond mandatory leave period. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

2. Civil Rights ⇐13.12(3)

Complaint in which female employees of city board of education and department of social services alleged that rules and regulations of city agencies, which plaintiffs claimed arbitrarily compelled pregnant women employees to take unpaid leaves of absence even if they desired to and were capable of continuing to work beyond mandatory leave period, denied them equal protection was sufficient to state claim upon which relief could be granted. 28 U.S.C.A. § 1343(3); Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e and § 1983; U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⇐224

Sex legislation is automatically suspect. Civil Rights Act of 1964, § 701,

A-10

42 U.S.C.A. § 2000e and § 1983; U.S. C.A.Const. Amend. 14.

4. Federal Civil Procedure ⇐2197

In action brought by female employees of city board of education and department of social services challenging rules and regulations of city agencies, which plaintiffs claimed arbitrarily compelled pregnant women employees to take unpaid leaves of absence even if they desired to and were capable of continuing to work beyond mandatory leave period, questions of fact existed as to whether women were compelled in every case to leave in seventh month of pregnancy except when eighth month of pregnancy occurred during last month of school term or whether individualized medical judgment was made in each case, thus precluding summary judgment. 28 U.S.C.A. § 1343(3); Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e and § 1983; U.S.C.A.Const. Amend. 14.

5. Federal Civil Procedure ⇐134

Civil rights action instituted by female employees of city board of education and department of social services on behalf of themselves and other female employees in city agencies similarly situated challenging rules and regulations of city agencies which plaintiffs claimed arbitrarily compelled pregnant women employees to take unpaid leaves of absence even if they desired to and were capable of continuing to work beyond mandatory leave period could be maintained as class action. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.; Civil Rights Act of 1964, § 701, 42 U.S.C.A. § 2000e and § 1983; U.S.C.A.Const. Amend. 14.

Nancy Stearns, Center for Constitutional Rights, New York City, Oscar G. Chase, Brooklyn, N. Y., for plaintiffs.

J. Lee Rankin, Corp. Counsel, City of New York, by Victor P. Muskin, Asst. Corp. Counsel, New York City, for defendants.

Memorandum Opinion and Order on Motion to Dismiss and for Summary Judgment

MOTLEY, District Judge:

This is an action by female employees of the New York City Board of Education and the New York City Department of Social Services on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on federal constitutional grounds, rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compel pregnant women employees to take unpaid leaves of absence when they desire to and are capable of continuing to work beyond the mandatory leave period.

The complaint alleges that in the case of pregnant female employees agency *policy* permits such employees to work through the seventh month of pregnancy with the approval of the agency physician. However, under city-wide leave *regulations* pregnant female employees are permitted to work only until the completion of the fifth month of pregnancy, unless they receive agency medical approval *and* approval of the head of the agency involved (Complaint, para. 22, 26.) The only exception to the aforesaid policy obtains when the eighth month of pregnancy occurs during the last month of the school term (Complaint, para. 28.) This, of course, applies only to women in the school system.

The primary constitutional claim is that the policy making unpaid leave mandatory at the end of the seventh month of pregnancy is arbitrary and without medical foundation and therefore violates plaintiffs' rights to liberty and property and equal protection guaranteed them by the Fourteenth Amendment to the Constitution.

Defendants have moved to dismiss this action on the ground that 1) the court lacks jurisdiction of the subject matter; or 2) the complaint fails to

state a complaint on which relief can be granted. The motion is denied.

Jurisdiction in this court is predicated solely on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the civil rights statutes.

[1] In moving to dismiss the action on jurisdictional grounds defendants relied upon the decision of the Second Circuit in Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) and its progeny. Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971); Canty v. Board of Education, 448 F.2d 428 (2d Cir. 1971). Defendants' claim is that the gravamen of the complaint—that plaintiffs have been deprived of the income they would have earned had they not been required to take maternity leave—is nothing more than a claim of injury to personal liberty which is dependent for its existence upon the infringement of a property right and, therefore, not a claim cognizable under the civil rights jurisdiction of this court. 28 U.S.C. § 1343(3).

In Eisen v. Eastman, the Second Circuit had held that jurisdiction under the Civil Rights Acts, Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 1343(3), could not be predicated on a claim of infringement of property rights. However, the Supreme Court in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1115, 31 L.Ed.2d 424 (1972) ruled that it "has never adopted the distinction between personal liberties and proprietory rights as a guide to the contours of § 1343(3) jurisdiction" and expressly rejected the distinction. The complaint, therefore, cannot be dismissed for lack of subject matter jurisdiction.

[2] Plaintiffs' equal protection claim is that the requirement that a woman employee take a leave of absence at an arbitrary period during her pregnancy discriminates against women generally, and pregnant women in particular, in violation of rights guaranteed by the Fourteenth Amendment, by placing an unconstitutional limitation on their employment.

It is true, as plaintiffs claim, that equal rights for women is an idea whose time has come. As a result, the courts have begun to re-examine all sex based restrictions and to apply with increasing sensitivity the guarantee of equal protection of the laws to prohibit arbitrary sex discrimination. Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (discrimination against unwed fathers with respect to custody of their children); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (discrimination against women in appointment to administration of estates); White v. Crook, 251 F.Supp. 401 (M.D. Ala.1966) (jury discrimination against women); United States ex rel. Robinson v. York, 281 F.Supp. 8 (D.Conn.1968) (unequal sentences for men and women); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (E.D.Va.1970) (exclusion of women from state institution of higher education); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) (exclusion of women from employment as bartenders); Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss.1969) (exclusion of mothers of illegitimate children from public schools).

[3] Discrimination against women in employment generally is now prohibited by national law. 42 U.S.C. § 2000e. Discrimination against pregnant women employees and in the application of disability benefits to pregnancies has recently been prohibited by the Rules and Regulations of the Equal Employment Opportunity Commission. 37 Fed.Reg. 6837. An equal rights amendment to the Federal Constitution is making its way through the ratification process of the states. Sex legislation is thus automatically suspect. Reed v. Reed, *supra*.

Very recently two federal district courts relied upon the guarantee of equal protection to invalidate state maternity leave policies similar to those in the instant case. Cohen v. Chesterfield County School Board, 326 F.Supp. 1159 (E.D.Va.1971); Schattman v. Texas Employment Commission, 330 F.Supp. 328, 331 (W.D.Texas 1971). The favor-

A-12

able decision in the *Schattman* case, however, was reversed by the Court of Appeals for the Fifth Circuit, 459 F.2d 32 (5th Cir. 1972) (Judge John Minor Wisdom, dissenting). The majority held that the compulsory maternity leave after the seventh month involved there was shown to be reasonably and rationally related to a permissible state purpose.

In Cohen v. Chesterfield County School Board, *supra*, women were required to take a leave of absence after the fifth month of pregnancy. There the court ruled: "The maternity policy of the School Board denies pregnant women such as Mrs. Cohen equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." (326 F.Supp. at 1161.)

The instant complaint, therefore, cannot be dismissed for failure to state a claim upon which relief may be granted.

[1] On the other hand, plaintiffs' motion for summary judgment cannot be granted. The central issue of fact is disputed. Plaintiffs claim that women are compelled in every case to leave in the seventh month of pregnancy, except when the eighth month of pregnancy occurs during the last month of the school term. On page 16 of defendants' brief on their motion they assert: "A teacher may continue working, however, until such time as her pregnancy condition interferes with the effective performance of her duties. There is no arbitrary seven month rule." Defendants state in a letter dated March 28, 1972, addressed to the court, that their policy is that an "individualized medical judgment is made in each case accommodating the teacher's desires with its medical examiner's professional judgment as to her ability to deliver satisfactory performance with reasonable safety to herself."

In the *Cohen* case the court ruled that "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor." (326 F.Supp. at 1160.) Whether the defendants would accept the medical judgment of the pregnant teacher's doctor and a waiver of any claim of liability against defendants, such as was offered by one of the plaintiffs, is not at all clear. Whether defendants require other medically disabled persons to submit to the medical judgment of defendants' doctors as opposed to their own is also not clear.

Therefore, the plaintiffs' motion for summary judgment must be denied.

[5] Plaintiffs have also moved for an order designating the present action a class action. The motion is granted. Plaintiffs represent a class which is so numerous that joinder of all members is impractical. There are numerous women employees in the City of New York's many agencies. There are questions of law and fact common to the class. The claims of the instant plaintiffs are typical of the claims of other members of the class. This court finds that plaintiffs will fairly and adequately protect the interests of the class. The action is further maintainable as a class action since the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of the controversy. The court also finds all other criteria for determining whether a class action should be allowed met in this case. Rule 23, Fed.R.Civ.P.

So ordered.

A-13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL, SUSAN TERKALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULE M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK: HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants.

AMENDED COMPLAINT
CLASS ACTION

71 Civ. 3324

JURISDICTION

1. Jurisdiction over this action is invoked pursuant to 28 U.S.C. 1343(3) and (4) relating to actions under 42 U.S.C. 1981, 1983 and 2000e et seq. and the Constitution of the United States, in particular the First, Ninth and Fourteenth Amendments.

2. Jurisdiction over this action is also invoked pursuant to 42 U.S.C. 2000e-5(f)(3) relating to actions under 42 U.S.C. 2000e et seq. . (Title VII of the Civil Rights Act of 1964)

3. Plaintiffs' action for declaratory and injunctive relief and for damages is authorized by 28 U.S.C. 2201 and 2202, 42 U.S.C. 1981 and 1983 and by 42 U.S.C. 2000e-5(g).

CLASS ACTION ALLEGATIONS

4. Plaintiffs sue on their own behalf and on behalf of all others similarly situated pursuant to Rule 23(b)(c) and (?) of the Federal Rules of Civil Procedure. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class.

5. Plaintiffs represent, on information and belief, over one thousand women who are City employees, either of the Board of Education or the Department of Social Services, or other city agencies who have been, or will be arbitrarily compelled to take an unpaid leave of absence from their employment solely because of their pregnancy when they wished to and were physically capable of continuing to work. In bringing this action, these women are exercising their rights under the First, Ninth and Fourteenth Amendments to the United States Constitution. in particular, their rights to bear children and remain full, active and equal members of society without the arbitrary and capricious interference of their employers. All of these women wish to make the private determination of when to terminate their employment because of their pregnancy without the arbitrary interference and unreasonable discrimination of City compulsory maternity leave policies which deprive them of their civil rights under color of law. The members of the class are so numerous that joinder of all of them is impracticable.

6. Plaintiffs are women who have already had their employment unconstitutionally terminated because of City policies of compulsory maternity leave, but sue on behalf of all other women, for whom questions of law and fact would be the same.

Plaintiffs adequately and fairly represent all members of the class since all women city employees are, have been, or would be subject to the unconstitutional policies of compulsory maternity leave.

7. Plaintiffs know of no conflicts of interest among the members of the class.

8. Plaintiffs claims are typical of the claims of the class.

9. There are questions of law and fact common to the class concerning whether Board of Education and Department of Social Services Policies as they relate to compulsory maternity leave for women employees are constitutional on their face and as applied by defendants in violation of the First, Ninth and Fourteenth Amendments.

10. The questions of law and fact common to the members of the classes predominate over any questions affecting only individual members. A class action is superior to other available means for the fair and efficient adjudication of the controversy. Plaintiffs know of no interest of members of the class in individually controlling separate actions. Plaintiffs know of no difficulties likely to be encountered in the management of a class action.

PLAINTIFFS

11. JANE MONELL is a citizen of the State of New York and of the United States.

12. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Monell was employed as a Supervisor at the Bureau of Child Welfare, Department of Social Services of the City of New York.

13. SUSAN TERRALL is a citizen of the State of New York and of the United States.

14. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Terrall was employed by the Board of Education of the City of New York as a teacher of English as a second language in the Work Incentive Program for Adult Education. Prior to said involuntary leave of absence, Ms. Terrall had been employed as a teacher for 10 months in the Work Incentive Program with a junior high school provisional regular license.

15. BEVERLY ZAPATA is a citizen of the State of New York and the United States.

16. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Zapata was employed by the Board of Education of the City of New York as a teacher of basic education courses in the Work Incentive Program. Prior to her compelled leave of absence, she had been employed as a teacher in the Work Incentive Program with a Regular Common Branches License.

17. Plaintiff, CAROL ABBEY is a citizen of the State of New York and the United States.

18. Until unlawfully compelled to take a leave of absence because of pregnancy, Ms. Abbey was employed as an English teacher by the Board of Education of the City of New York at Junior High School 227.

Ms. Abbey has been a teacher at J.H.S. 227 since September 1967. She now holds a regular junior high school English license.

DEFENDANTS

19. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK is a department of the city government under its charter, and is authorized to hire and grant leave to its employees subject to the by-laws of the City of New York and of the Department of Social Services.

20. JULE SUGARMAN is the Director of the Department of Social Services.

21. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK is a department of the city government which under its charter is charged with maintaining the public school system for the City. It is authorized to hire and grant leave to its employees subject to its by-laws.

22. HARVEY SCRIBNER is Chancellor of the New York City Board of Education.

23. JOHN LINDSAY is the Mayor of the City of New York.

24. Defendants are sued in their official capacity.

25. On February 22, 1971, plaintiff Monell requested maternity leave to commence March 8, 1971, from her Supervisor, Ms. Sydnor. Her request was submitted with a letter from her personal physician, stating that her expected date of delivery was April 17, 1971.

26. On February 24, 1971, plaintiff Monell was informed she must leave work on Friday, February 26, 1971, as she was already in her eighth month of pregnancy.

27. On February 25, 1971, plaintiff Monell protested the forced termination date in a memorandum to Irving Damsky, Director, Department of Personnel, Bureau of Child Welfare, Department of Social Services. In this memorandum she requested that her leave be effective March 29, 1971, and further offered to sign a waiver of liability and secure a note from her physician verifying her physical good health if permitted to continue to work. Receiving no reply to said memorandum, on February 26, 1971, Ms. Monell left work as directed.

28. On or about March 10, Ms. Monell recieved a letter from Inez Simon, Division of Personnel Relations, Department of Social Services, Bureau of Personnel Administration, re-confirming that her request to continue work until March 29, 1971, had been denied and indicating that the denial was based on a department policy permitting staff members to work through the seventh month of pregnancy with the approval of their Bureau Physician. The letter also noted that under city-wide leave regulations pregnant employees are permitted to work only until the completion of the fifth month of pregnancy unless they receive "agency medical approval" and approval of the head of the agency by whom they are employed. [See letter, Appendix A annexed to the original complaint and made a part hereof.]

29. In January 1971, plaintiff Susan Terrall requested maternity leave to commence on April 1, 1971, from her then supervisor Ms. Vilma Alverez. Her request was accompanied by a note from her obstetrician, Dr. Leonard Elmaleh stating that she could work until April 1, 1971. In establishing the date of April 1, Dr. Elmaleh, indicated to plaintiff Terrall that there was no medical reason why she could not work as long as she wished. Plaintiff Terrall indicated whe wished to work until April 1. Plaintiff Terrall's expected date of delivery was April 22, 1971. When plaintiff Terrall was transferred from the San Juan Center to St. Anselm's School her request was transferred to her new supervisor, Murray Liebman.

30. During the second week in January 1971, plaintiff Beverly Zapata requested maternity leave to commence on April 1, 1971, from her supervisor, Murray Liebman. Her request was accompanied by a note from her obstetrician, Dr. Eulogio Jerez stating she could work until March 15, 1971. Dr. Jerez indicated to plaintiff Zapata without further explanation that he had chosen the March 15th date for "legal" not medical reasons. The note indicated that plaintiff Zapata's expected date of delivery

was April 11, 1971.

31. Plaintiffs Terralll and Zapata were told by Mr. Liebman that they must have a physical examination done by the Board of Education Physician.

32. On March 1 ,1971, they went to the Board of Education on Court Street, Brooklyn, New York, as directed. At the physical examination their blood pressure was taken, the doctor felt the size of their babies and noted the due dates indicated by their obstetricians. The Board of Education doctor then informed plaintiffs Terrall and Zapata that since they were past their seventh month of pregnancy they were supposed to stop work immediately but that they could complete the week.

33. Plaintiffs Terrall and Zapata both worked until March 5, 1971.

34. On September 10, 1971, the first day of the fall 1971 school term, plaintiff Abbey informed Jacob Gore, the principal of J.H.S. 227 that she was pregnant and would take maternity leave before the end of the term.

35. Mr. Gore stated that if Ms. Abbey were an incompetent teacher she would have been asked to leave on September 10th, but that since Ms. Abbey was not an incompetent teacher she could continue at her job.

36. On November 11, 1971 Mr. Gore asked Ms. Abbey when she expected to begin her maternity leave. Ms. Abbey informed Mr. Gore that with her physician's advice and consent, she was physically able to continue teaching until January 3, 1971 and that she wished to do so.

37. On Nobember 12, 1971 Ms. Abbey received a letter from Mr. Gore instructing her to report to the Medical Division of the Board of Education "for a consultation and/or examination".

38. On November 16 , 1971 Ms. Abbey reported to the Medical Division for á "consultation and examination", conducted by Dr. Sathmary, a Board of Education physician.

39. Dr. Sathmary informed Ms. Abbey that inasmuch as she had completed her seventh month of pregnancy she could no longer teach. She stated that it was the policy of the Board of Education that once a teacher passed her seventh month of pregnancy, maternity leave was mandatory and no exceptions could be made.

40. Dr. Sathmary took Ms. Abbey's blood pressure and felt her abdomen. She stated that Ms. Abbey was in fine health and that her condition was normal.

41. Ms. Abbey informed Dr. Sathmary that she felt fine and was desirous of continuing her teaching duties. Ms. Abbey's personal physician, Dr. Jere Faison, specializing in obstetrics and gynecology, based on his continuing and recent examination of Ms. Abbey, approved her continuing in her teaching duties until January, 1972. This recommendation was conveyed to Dr. Sathmary.

42. Dr. Sathmary stated that the recommendations of Ms. Abbey's physician would make no difference regarding the question of Ms. Abbey's teaching beyond her seventh month because the policy of the Board of Education did not permit it. Dr. Sathmary stated that the physicians' letters were only used to verify how long a teacher has been pregnant. Dr. Sathmary told Ms. Abbey that she had to begin her leave of absence November 29, 1971.

43. Subsequent to the filing of the original complaint in this action, Title VII of the Civil Rights Act of 1964 (42USC 2000e-(a) was amended to cover municipalities, which were

previously exempt. Within the statutory period therefore, all named plaintiffs duly filed a discrimination complaint with the Equal Employment Opportunity Commission. Prior to such filing plaintiffs Monell, Terrall and Zapata duly filed discrimination complaints with the New York City Commission on Human Rights. Plaintiff Abney was advised by the City Commission that the pendency of this instant action, prevented the City Commission from assuming jurisdiction of her complaint.

44. On information and belief the policy of the BOARD OF EDUCATION requires that pregnant employees stop work at the completion of the seventh month of pregnancy.

45. On the information and belief the only exception to that policy occurs when the eighth month of pregnancy occurs during the last month of the school term. Under those circumstances the employee may work until the end of the term. On information and belief this arbitrary policy is purely for the convenience of the BOARD OF EDUCATION and in no way relates to the need of the employee.

46. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy are in violation of plaintiff's right to liberty and property guaranteed under the Fourteenth Amendment.

47. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy discriminate against plaintiffs on basis of their sex in that the policies are wholly without medical basis and establish arbitrary limits on the employment of pregnant women in violation of their rights under the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

48. The policies of defendants in arbitrarily requiring plaintiffs to stop work at the completion of their seventh month of pregnancy violates plaintiffs' rights to have and raise a family without the imposition of unconstitutional conditions by defendants as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution.

49. The policies of defendants in arbitrarily requiring plainitiffs to stop work at the completion of their seventh month of pregnancy chill and deter and discourage plaintiffs in the exercise of their rights under the First, Ninth, and Fourteenth Amendments to have and raise a family.

50. Plaintiffs were arbitrarily compelled to take unpaid leaves of absence from their employment solely because of their pregnancy; such compelled leave having no relationship to their ability to satisfactorily perform their jobs.

51. In compelling plaintiffs to take such leave, defendants are arbitrarily and capriciously depriving plaintiffs of their right to bear children and remain full, active and equal members of society. The aforesaid actions of defendants acting under color of state law will deprive plaintiffs and the class they represent of their civil rights.

52. The aforesaid policies and actions of the defendants violate Title VII of the Civil Rights Act of 1964. (42 U.S.C. 2000e et seq)

53. If plaintiffs are not granted the relief they request immediate and irreparable harm will befall not only the plaintiffs but all others who are chilled and deterred from exercising their constitutionally protected rights to have and raise a family.

54. Plaintiffs have no adequate remedy at law.

RELIEF

WHEREFORE, plaintiffs pray that this Court grant the follwing relief:

1. That a declaratory judgment issue declaring that the policies of defendants Department of Social Welfare and Board of Education compelling female employees to take a leave of absence at the completion of their seventh month of pregnancy are unconstitutional and in violation of:

(a) the right to earn a livelihood, to be full and active members of the society and to decide whether to have children guaranteed by the Fourteenth Amendment to the Constitution;

(b) the right to the equal protection of the laws guaranteed by the Fourteenth Amendment;

(c) the right to have and raise a family without the imposition of unconstitutional conditions guaranteed by the First, Ninth and Fourteenth Amendments.

(d) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.)

2. That an injunction issue prohibiting and enjoining defendants, their agents, employees, attorneys or any other person ctive on their behalf, from further enforcing the aforesaid policy requiring employees to take a leave of absence at the completion of their seventh month of pregnancy.

3. That an order be entered: a) Awarding plaintiffs and their class damages plus interest for the deprivation of their right to be employed, including but not limited to wages lost by reason of the discriminatory acts herein alleged and measured from the dates of those discriminatory acts.

b) Awarding plaintiffs costs and attorneys fees in the prosecution of this action.

c) Granting such other and further relief as this Court may deem just, proper and equitable.

Respectfully submitted,

Nancy Stearns by Gregory Abbey

Nancy Stearns
Oscar G. Chase
Gregory Abbey, of Counsel

c/o Center for Constitutional Rights
588 Ninth Avenue
New York, N.Y. 10036
Tel.: 262-2500
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL, et al.,	:	
Plaintiffs,	:	
-against-	:	71 Civil 3324
DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK; JULE M. SUGARMAN, as Commissioner of the Department of Social Services; BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and JOHN V. LINDSAY, as Mayor of the City of New York,	:	JUDGE METZNER
Defendants.	:	NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavig of Margaret G. Gold, verified the 16th day of April, 1974, and all papers and proceedings had herein including the depositions conducted by plaintiffs on March 28, 1974 of Irving Damsky, Assistant Deputy Administrator for Personnel Management, Department of Social Services, and of individual physicians employed by defendant Board of Education on February 19, 1974 the undersigned will move this Court on the 22nd day of May, 1974 at 10:00 A.m. or as soon thereafter as counsel can be heard, at the United States Court House, Foley Square, New York, N.Y. for an order:

(a) pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the action; or alternatively

(b) pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment in defendants' favor; or alternatively

(c) pursuant to Rule 23 discontinuing the instant action as a class action and dismissing those portions of the complaint seeking relief on behalf of the class; or alternatively

(d) ordering the plaintiffs to give and pay for notice to their class; or alternatively

(e) staying the instant action pending the determination by the United States Supreme Court of Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (2d Cir.), reh. en banc den, 479 F. 2d 1020 (2d Cir. 1973) cert. granted 94 S. Ct. 235 (1973) and

(f) for such other and further relief as to this Court seems just and proper.

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
Tel. No.: 566-4146/2192

By: Margaret G. Gold
Margaret G. Gold
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL, et al.,

Plaintiffs,

-against-

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK; JULE M. SUGARMAN, as Commissioner of the Department of Social Services; BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants.

71 Civil 3324

JUDGE METZNER

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARGARET G. GOLD, being duly sworn, deposes and says:

1. I am an Assistant to ADRIAN P. BURKE, Corporation Counsel of the City of New York, attorney for defendants herein and am familiar with the proceedings had herein. I make this affidavit in support of the motions made by defendants as indicated in the notice of motions annexed hereto.

2. On March 28, 1974, a deposition was conducted by plaintiffs of Irving Damsky, Assistant Deputy Administrator for Personnel Management, Department of Social Services. Said deposition, at the request of plaintiffs and on consent of defendants was tape recorded and, to my knowledge, has not been transcribed to date. Likewise, on February 19, 1974 a deposition of Drs. Barbara Wright, Robert Lazarus,

David Gurin, Henrietta Eve, Lucy Schoenenberger, Salvatore Cinques, and William Herzlich, physicians employed by the Board of Education was tape recorded by plaintiffs and, to my knowledge, has not been transcribed. For this reason, I am putting into affidavit form the substance of portions of the testimony elicited from the above-mentioned individuals.

3. On March 28, 1947 1971 Irving Damsky testified that since the institution of the instant action and in or about September 1971, the Department of Social Services changed its maternity leave policy to theeffect that no women were required to take maternity leave. A pregnant employee was permitted to work as long as she was capable and desirous of doing so.

4. Mr. Damsky testified that the change of policy was effectuated shortly after the Department of Social Services was orally informed by the Human Rights Commission of the City of New York that it was considering issuing a finding that said policy was violative of the rights of pregnant women.

5. On or about January 19, 1972 Deputy Mayor Edward K. Hamilton issued a directive to all city agencies suspending the operation of the rules and regulations governing maternity leave. Said directive, annexed hereto as Exhibit "A", informed all city agencies that pregnant women should be permitted to continue in their jobs as long as they were capable and desirous of doing so.

6. The City's rules and regulations governing maternity leaves were formally amended effective September 1, 1972, to incorporate said new policy. See Exhibit "B" annexed hereto.

7. The Board of Education amended its by-law dealing with maternity leaves, effective September 1, 1973. Said amendment basically adopted the same policy as followed by the City. See Exhibit "C" annexed hereto.

8. Mr. Damsky and several of the Board's physicians have testified at depositions that very few individuals ever disagreed with a determination of the commencement date of their maternity leave.

9. It is respectfully submitted that the relief requested in the notice of motion be granted.

MARGARET G. GOLD

Sworn to before me this
16th day of April, 1974.

A. Michael Weber

A. MICHAEL WEBER
Notary Public, State of New York
Qualified in Nassau County
Commission Expires March 30, 1975

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

January 19, 1972

TO: ALL AGENCY HEADS

FROM: EDWARD K. HAMILTON, Deputy Mayor

SUBJECT: MATERNITY LEAVE REGULATIONS

* *

The Leave Regulation For Career and Salary Plan Employees (Section 5.6) permit a pregnant employee to work for such period beyond the 5th month of pregnancy " for which she secures agency medical approval to work and the approval of the agency head." I am advised that this discretion has been misunderstood in some cases, in that some agencies have adopted a blanket policy which prohibits pregnant employees from continuing to work beyond the end of the 7th month and, in some cases, beyond the end of the 5th month.

This is to inform you that in light of recent court developments and actions by federal agencies, I have directed the City Commission on Human Rights, the Department of Personnel and the Corporation Counsel to propose new maternity regulations. These new regulations, will be forthcoming in the very near future. In the interim, it would be in the City's best interest if you would exercise the discretion granted by the present leave regulations to permit women to stay on their jobs as long as they are able to work and desire to do so.

Your cooperation pending the issuance of new regulations will assist us immeasurably in protecting the City from a rapidly growing number of complaints filed with city, state, and federal anti-discrimination agencies and in protecting the rights of the women involved.

Also send to Legislative Director Council Liaison Union

1/31

Exhibit 11

A-31

To: [illegible] and Salary Plan employees

Date: August 21, 1972

Subject: Leave Without Pay in a Period of Pregnancy

Section 5.0 of the Personnel Instructions to Employees who are under the General and Salary Plan [illegible] pertaining to absence without pay as a result of pregnancy has been revised effective September 1, 1972. The new section now reads as follows:

5.0(a) Maternity leave of absence shall be granted to pregnant permanent employees for a period of up to 12 months. Such leave shall extend from [illegible] and not [illegible] than the end of her [illegible] of her intent to take such leave. Upon application of the employee, such leave may be extended by the agency head for an additional period not to exceed one year. Total leave for this purpose shall not exceed 24 months.

5.0(b) Maternity leave of absence shall be granted to pregnant non-permanent employees for a period of up to 12 months. Such leave shall commence upon request and [illegible] by the employee of her intent to take such leave. Upon application of the employee, such leave may be extended by the agency head for an additional period not to exceed one year. Total leave for this purpose shall not exceed 24 months. Upon [illegible] the agency head may evaluate her employment because of [illegible] necessity of the absence of her.

5.0(c) A pregnant [illegible] entitled to a leave of absence from her permanent position may [illegible] upon application to a higher position [illegible] concurrent leaves of absence from both positions pursuant to [illegible] 5.0(a) and (b) above. The leave from the permanent position may be terminated as provided in 5.0(b) without affecting the leave from the permanent position.

5.0(d) Where an employee's leave [illegible] leave and/or earned leave balance, she shall be [illegible] to the extent [illegible] of the number of her accrued sick leave balance plus her accrued annual leave balance [illegible] this period should be included within the 12-month maternity leave period.

5.0(e) [illegible] 5.0(c) provide that an agency head may [illegible]

(continued)

[illegible]

[illegible]

A-32

[illegible]

[illegible]

Section 5.0(b) [illegible] for a period of up to 12 months. [illegible] the agency head. Section 5.0(b) [illegible] employee for a period of up to 12 months. [illegible] extended for an additional [illegible] the discretion of the agency head.

[illegible]

Under the act [illegible] Section 5.0(a) [illegible] 5.0(b) the term [illegible] terminated by the agency [illegible] law.

The fact that an appeal [illegible] a position [illegible] of terminating such an employee [illegible] necessary" concept [illegible] the department of [illegible] basic criteria [illegible]

1) The duties of the position are essential to ongoing operations.

2) The position requires a lengthy period of on-the-job training.

3) The position cannot be filled with a [illegible] will not coincide with the expected [illegible]

4) The position cannot reasonably be filled temporarily.

Section 5.0(c) [illegible] who is on leave of [illegible] appointment to [illegible] from both positions [illegible] this is not [illegible]

(continued)

[illegible]

Section 5.0(a) now permits a pregnant employee to use all accumulated annual leave time and is no one limited of her accumulated sick leave. That section no longer permits [illegible] leave. Section 5.0(b) has been replaced by Section 5.0(f). It permits a permanent [illegible] leave with pay in the amount of [illegible] this is pay [illegible] Section 5.0(a) - 5.0(e). Sick leave and annual leave balances may be utilized by a pregnant employee prior to taking maternity leave as well leave balances may be utilized by any temporary employee.

SINGLE WOMEN

Pregnant employees will be granted maternity leave without regard to whether they are single or married. It is our intention to modify the present health insurance contracts to provide coverage for pregnancy to all female employees. (Once the child is born, he or she is eligible for coverage under and pursuant to the terms of the employee's contract for as long as the employee is eligible for health insurance coverage.

RETURN FROM LEAVE

The new leave regulation authorizing an appointing authority to request that an employee who has been on leave for disability or file an interim medical approval before the employee returns to work also applies to employees who return to work after leave for disability pursuant to Section 5.0(a) - 5.0(e).

DISCRIMINATION PROHIBITED

Discrimination against women employees and practices which have a discriminatory impact because of pregnancy are illegal, and the agency head in making determinations under these rules should be guided accordingly.

Larry L. Preston
City Personnel Director

ATTACHMENT TO HEADS OF BUREAU CIRCULAR NO.

Section 61a. Leaves of Absence for Maternity and/or Child Care for Members of the Administrative (non-pedagogical) Staff.

1. Leaves shall be granted by the Chancellor for personnel under the jurisdiction of the City Board and by the appropriate Community School Board for personnel under its jurisdiction.

2. Leaves of absence shall be granted for purposes of maternity and child care. The employee concerned should make reasonable notification of intent to take such leave so that arrangements may be made by the appropriate authority for necessary replacement of the employee during the period of the leave. Maternity leave shall be subject to the terms and conditions of laws, bylaws and regulations relating to leave with or without pay for personal illness except as provided herein.

3. Maternity leave shall commence at the date set in accordance with paragraph 2, above and shall end six weeks after the birth of the child or six weeks after the termination of the pregnancy. Such leave may be sooner terminated at the request of the employee in accordance with regulations.

The following payments will be made in connection with such leave:

a. The employee may be paid for the days in her sick bank.
b. The employee may be paid for all accrued annual leave and compensatory time standing to her credit after the exhaustion of sick bank credits.

4. Child care leave shall be granted to a natural or adoptive parent upon application. Such leave is granted to a member of staff so that he or she may devote a more substantial portion of his or her time to the care of the young child, than could be done while pursuing full-time employment; therefore, full-time employment while on such leave is prohibited. If both parents are employees of the school system, only one of them may be on a child care leave at any given time.

For an employee who has completed a maternity leave after the birth of a child, the child care leave shall commence at the termination of the maternity leave. For any other employee, it shall commence as granted.

The Chancellor shall make regulations governing the maximum length of child care leaves. Leaves may be terminated at the request of the employee in accordance with regulations. Child care leaves shall be without pay except that employees may be paid for all accrued annual leave or compensatory time standing to their credit prior to commencement of such leaves.

5. An employee in probationary status shall not accumulate credit toward completion of the probationary period during the time the employee is on unpaid leave. Replacement of employees shall be accomplished in a manner consistent with the needs of the school system and Federal laws and regulations concerning discrimination.

6. Health insurance coverage under the choice of plans provided to employees will continue while the employee is in pay status. Provided a pregnant employee uses up all paid leave time, coverage will continue until six weeks after the birth of the child or termination of pregnancy.

7. Any prior provisions of the Bylaws or any regulations notwithstanding, conditions relating to pregnancy may be charged to sick leave balances.

8. The Chancellor is authorized to promulgate such regulations as may be necessary to carry out the provisions of this section.

Exhibit-1
A-35

Board of Bureau Circular No. 1973-1874

THE CITY SCHOOL DISTRICT OF NEW YORK
DIVISION OF PERSONNEL

January 23, 1974

TO: COMMUNITY SCHOOL BOARD CHAIRMEN, ALL SUPERINTENDENTS, EXECUTIVE DIRECTORS AND HEADS OF BUREAUS

Ladies and Gentlemen:

REGULATIONS GOVERNING LEAVES OF ABSENCE FOR MATERNITY AND/OR CHILD CARE FOR MEMBERS OF THE ADMINISTRATIVE (NON-PEDAGOGICAL) STAFF

NOTE: Since this circular represents a major change in employee rights and benefits, IT SHOULD BE BROUGHT TO THE ATTENTION OF ALL MEMBERS OF THE ADMINISTRATIVE (NON-PEDAGOGICAL) STAFF. Chief Clerks and other members of staff responsible for processing and granting and/or processing leave requests (including sick leave) should read it carefully and retain a copy for reference.

At its meeting on November 28, 1973, the Board of Education adopted new Bylaws relating to leaves of absence for maternity and child care. The new Bylaws are effective as of September 1, 1973. They are intended to satisfy the Guidelines on Sex Discrimination issued by the Federal Equal Employment Opportunity Commission in relation to leaves for maternity.

The major facets of the new policy are:

1. An employee on maternity leave may be paid for the days in her sick bank, accrued annual leave and compensatory time.

2. There is no mandatory date for beginning a maternity leave.

3. Child care leaves are provided for natural or adoptive parents of either sex.

4. Health insurance coverage may be continued until six weeks after the birth of the child or termination of pregnancy while in unpaid status.

Following are the regulations adopted by the Chancellor in accordance with the new Section 61a of the Bylaws as authorized by Subdivision 8 thereof. For reference, a copy of Section 61a is attached to this circular.

A. Maternity and/or Child Care Leaves Generally

1. Leaves shall be granted by the Chancellor for personnel under the jurisdiction of the City Board and by the appropriate Community School Board for personnel under its jurisdiction, as follows:

   a. The Chancellor has delegated the responsibility of granting leaves to personnel under the jurisdiction of the City Board to the Division of Personnel.

   b. Community School Boards may delegate this responsibility to their Community Superintendents.

2. The leave granting authority is required to grant such leaves upon application in accordance with these regulations.

B. Maternity Leave

1. Maternity leave shall be subject to the terms and condition of laws, bylaws and regulations relating to leave with or without pay for personal illness except as provided herein.

2. A pregnant employee may continue working as long as she is physically capable of performing all of the duties of her position. There is no requirement that a pregnant employee begin leave at any specific point in the term of the pregnancy.

3. Absence for the purposes of pregnancy and pregnancy related illnesses may be charged to sick leave balances in accordance with regulations for use of sick leave balances. Specific exclusions of pregnancy and pregnancy related illnesses in such regulations are null and void.

   a. Absences for this purpose may be self-treated within limits prescribed in the Rules and Regulations for Administrative Employees.

   b. Employees may apply for advance of sick leave allowance and for additional grant of sick leave in accordance with paragraphs 5.07 and 5.08 of the Rules and Regulations for Administrative Employees and/or for sick leave without pay.

4. Application for maternity leave should be made at least 30 days before the effective date of the leave. This notice is requested so that arrangements may be made for the replacement of the employee during such leave. If the employee's intention is to cease work at or shortly before the date of confinement, application should show probable date of leave.

5. The employee may, in her option, apply directly for a maternity leave and a child care leave. (See Section D concerning Child Care Leaves). Applicant will nevertheless be paid for the days in her sick bank, accrued annual leave and compensatory time balances.

6. Maternity leave shall terminate six weeks after the birth of the child or termination of pregnancy. No sick leave payments may be made after that date.

   However, an employee may, because of illnesses either related or unrelated to maternity, avail herself of paid or unpaid sick leave (depending upon her sick leave balance) subject to the submission of a certificate from her physician and its approval by the School Medical Director. The School Medical Director shall evaluate such certificate and may, in his discretion, call the employee for physical and medical examination. This paragraph does not apply to an employee who has resumed work after the birth of a child.

7. Before resuming service after the birth of the child or after interruption of pregnancy, an employee on maternity leave or on sick leave for childbirth, miscarriage or abortion shall present to the School Medical Director a certificate from her physician stating the condition of her health. The School Medical Director shall evaluate such certificate and may, in his discretion, call the employee for physical and medical examination. Such certificate is not required if resumption of service is more than six weeks after childbirth, or termination of pregnancy.

8. Where an employee's immediate supervisor finds that the employee's physical condition, as a result of the pregnancy materially reduces her ability to perform the duties of her position, a medical examination may be requested in accordance with the regulations which apply to other medical conditions which interfere with the performance of an employee's duties. For this purpose, occasional short-term absences are <u>not</u> considered to materially reduce an employee's ability to perform her duties. Procedures which may be used are:

   a. To request a medical evaluation in accordance with Section 2568 of the Education Law. Such request must include a statement of how the employee's work is impaired and must be approved by the Chancellor or the Community Superintendent as appropriate.

   b. To refer the employee to the Medical Division in accordance with paragraph 5.10 of the Rules and Regulations for Administrative Employees.

9. Maternity leaves shall not be granted to employees on unpaid leave. Such employees may, however, apply for child care leaves.

C. Continuation of Health Insurance Coverage During Maternity Leave

1. Effective September 1, 1973, employees beginning maternity leave are permitted to continue their city health insurance coverage for themselves and their eligible dependents for a period up to six weeks after termination of pregnancy, provided all leave balances are exhausted and she is no longer on payroll.

2. An employee wishing to continue health insurance coverage must complete the top portion of Form D. P. 1055, "Request for Continuation of Health Insurance While on Maternity Leave", and submit it to her payroll officer at least one month prior to the start of the maternity leave. Copies of D. P. 1055 may be obtained from Health and Welfare Services Unit, 65 Court Street, Room 502, phone 596-6966.

3. The payroll officer is to complete the section marked "For Payroll Clerk Only" and sign the box marked "Approved By". The "Date to be Removed from Payroll" should be the beginning of the payroll period following the last day on payroll.

   Copies of the D. P. 1055 are to be distributed as follows: White copy to the Medical Carrier, Yellow copy to the employee, Pink copy in the employee's personnel file.

4. When pregnancy terminates, the employee should put the child's name, date of birth, and sex in the space provided on the Yellow copy of the D. P. 1055 in her possession, and return it to the medical carrier. The carrier will then remove the employee from City health insurance coverage six weeks after the birth of the child or termination of pregnancy and send a direct payment bill. An employee who returns to work must complete a new Health Authorization Form (D. P. 1053) in order to be returned to the City group.

D. Child Care Leave

1. A child care leave shall be granted upon application in accordance with these regulations to a natural or adoptive parent of either sex. Such leave is granted so that the employee may devote a more substantial portion of his or her time to the care of a young child than could be done while pursuing full time employment.

2. The following restrictions are applicable:

   a. Full time employment while on such leave is prohibited.

   b. If both parents are employees of the school system, only one of them may be on a child care leave at any given time.

3. Application for child care leave should be made at least 30 days before the effective date of the leave so that arrangements may be made for the replacement of the employee during such leave.

4. For an employee who has completed a maternity leave after the birth of a child, the child care leave may commence at the termination of the maternity leave. For any other employee, it may commence as follows:

   a. For an employee who has not completed a maternity leave, a child care leave may commence no earlier than the date of birth of the child.

   b. The commencement of a leave for care of adopted child should be reasonably related to the date the child is placed in the home but may be later.

5. Such leave shall terminate two years from the beginning of the maternity leave if such has been granted. Where no maternity leave has been granted, the leave shall terminate upon the child's reaching the age of two years.

6. A child care leave may be terminated at the request of the employee at an earlier date than the one set forth in paragraph 5 above.

7. Child care leaves shall be without pay except that annual leave and compensatory time balances may be used prior to the commencement of the leave, but such pay shall not duplicate payment granted under Section B paragraph 5 of these regulations. No sick leave with or without pay shall be granted to an employee on child care leave.

8. If, during child care leave or during any other unpaid leave, the occasion arises to request a child care leave by reason of the birth or adoption of a child, the employee concerned may so apply and the leave shall be granted upon application. Such leave shall commence upon the date of birth (or placement for adoption) of the child and shall be subject to pertinent provisions of these regulations.

E. Provisional and Temporary Employees

1. Provisional and temporary employees may use sick leave balances, vacation pay and compensatory time balances for maternity purposes in accordance with regulations, provided, however, that such payment may be discontinued in the event that certification of an eligible list prevents their continuance on payroll.

2. Provisional and temporary employees who are pregnant and who have health insurance coverage under the choice of plans may continue such coverage in accordance with Section C of these Regulations.

3. Replacement of such employees shall be accomplished in a manner consistent with the needs of the school system and with laws and regulations concerning discrimination. Where such an employee is taking a short period of time for maternity purposes, every effort should be made to treat such absence in the same manner as an illness. If it is unlikely that the position will be filled prior to the employee's return, it should be held for her. Consideration should be given to the circumstances in individual cases, including specifically the length of time required to train a replacement. Nothing in these regulations, however, shall be construed to require the holding of a specific opening for the return of such employee after maternity or after a prolonged personal illness.

4. A permanent employee granted a maternity or child care leave while serving provisionally in a higher title shall upon return to duty be restored to such provisional status if the position has not been filled by a permanent employee.

F. Effect on Probation

An employee in probationary status does not accumulate credit towards completion of the probationary period during the time the employee is on unpaid leave.

G. Effective Date

These regulations are effective September 1, 1973.

H. Questions concerning this circular should be directed through normal supervisory channels. Schools in Community Districts should direct questions to the personnel officers of their districts; City District schools to the office of their supervising Superintendents. Where the personnel in these offices are unable to answer questions, they will contact the Division of Personnel for answers and inform the schools originating the questions. It is also requested that questions to the Division of Personnel be in writing. Replies will be prompt.

Very truly yours,

FRANK C. ARRICALE, II
Executive Director

APPROVED:

IRVING ANKER
Chancellor

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL et al.
Plaintiffs

71 CIV 3324

- JUDGE METZNER

against

DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants

NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the annexed affidavit of plaintiff Jane Monell, the Stipulation as to testimony of Irving Damsky, the Statement of Facts Not in Substantial Dispute, and the annexed memorandum of law, plaintiff Jane Monell will move this Court on the 21st day of June, 1974 at 10:00 A.M. at the United States Court House, Foley Square, New York, N.Y., for an order granting summary judgment in her favor, awarding her back pay, enjoining the defendants from applying any mandatory maternity leave policy, and declaring unconstitutional the maternity leave policy which was in effect in February, 1971, and for such other and further relief as to this court seems just.

Yours, etc.

Oscar G. Chase
c/o Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Tel: 625-2200

Nancy Stearns
Gregory Abbey
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys for Plaintiffs

Served + filed
May 29 74

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL et al.
Plaintiffs

against

DEPARTMENT OF SOCIAL SERVICES, et al.
Defendants

71 CIV 3324

JUDGE METZNER

AFFIDAVIT OF
PLAINTIFF JANE
MONELL

COUNTY OF NEW YORK)
STATE OF NEW YORK) SS:

JANE MONELL, being duly sworn, deposes and says:

1. Until February 26, 1971 I was employed on active status by the defendant Department of Social Services of The City of New York at the rank of Supervisor I. I was assigned to direct the social work staff at Callagy Hall Annex, an institutional shelter for homeless little girls run by the defendant Department. As far as I know my superiors considered my work to be of a high quality. None of my duties involved any physical hazard not present in any ordinary office situation.

2. I was required by defendants to go on maternity leave status, without pay, on February 26, 1971, although I had requested permission to work until March 29, 1971.

3. I first officially advised the defendants that I was pregnant on February 22, 1971, although it was apparent to my immediate supervisors well before then. I also then advised the defendants that my expected date of delivery was April 17, 1971. (I actually delivered on April 21, 1971.) In conjunction with my request to continue working I advised defendants that my obstetrician, Dr. Benjamin Segal, approved of my continued employment. I also offered to waive liability if I was injured on the job because of my pregnancy.

4. In spite of my request t.. defendants insisted that I could not work beyond February 26, 1971 because of their policy prohibiting work beyond the seventh month of pregnancy. They stated this in the letter of Ms. Inez Simon of March 9, 1971, which is annexed to my affidavit.

5. As a result I lost approximately one month's pay. I feel this was unnecessary and unjust. I also feel that I was subjected to this injustice solely because I am a woman. I find this treatment humiliating and degrading.

Jane Monell

JANE MONELL,
PLAINTIFF

Sworn to before me
this 29th day of May, 1974

A-42

City of New York

DEPARTMENT OF SOCIAL SERVICES
BUREAU OF PERSONNEL ADMINISTRATION
100 CHURCH STREET, NEW YORK, N. Y. 10013

In Reply Refer
433- 3203
Telephone N

March 9, 1971

Miss Jane M. Monell (Ferrari)
55 West 95th Street
New York, N.Y.

Dear Miss Monell:

In accordance with medical information which you submitted, a maternity leave of absence has been approved for you for one year, from March 1, 1971 through February 29, 1972. Annual leave and overtime credits, if available, will be applied and the balance of the leave will be without pay.

In your memorandum of February 25, 1971, you requested permission to work until March 29, 1971 and protested the decision that your leave begin on March 1, 1971.

City-wide leave regulations require that "Existence of pregnancy shall be reported by the employee, in writing, to the head of the agency not later than the completion of the fourth month of pregnancy. A pregnant employee shall be permitted to work up to the completion of the fifth month of pregnancy, and for such further period for which she secures agency medical approval to work and the approval of the agency head." Departmental policy permits staff members to work through the seventh month of pregnancy with the approval of our Bureau Physician.

The medical statement which you submitted with your request for maternity leave was dated February 19, 1971 and indicated an expected confinement date of April 17, 1971. Thus, you had already gone beyond the seventh month of pregnancy and it was necessary that your maternity leave of absence begin without undue delay.

We suggest that a month before the end of the leave, you get in touch with us as to whether you plan to return to work or require an extension of the leave up to a maximum of six months.

Upon your return to work, please report to our Placement Section with a copy of your child's birth certificate and a statement from your physician attesting to your ability to resume your duties. If you change your address during your leave, please notify us so that our records can be kept current.

Upon your return to staff, you will be expected to complete the unfilled portion of the committment which you signed in connection with your paid educational leave.

You have our best wishes for good health and happiness.

Sincerely,

DIVISION OF PERSONNEL RELATIONS

Ines Simon

By: Ines Simon

A-43

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JANE MONELL, et al.,

Plaintiffs,

-against-

DEPARTMENT OF SOCIAL SERVICES, et al.,

Defendants.

----------x

STIPULATION

71 Civ. 3324

Judge Metzner

On March 28, 1974 plaintiffs conducted a deposition of Irving Damsky, Assistant Deputy Administrator for Personnel Managment of the Department of Social Services of the City of New York. That deposition was tape recorded but has not been transcribed. In the interest of expedition and in order to minimize expense the parties hereby stipulate that Mr. Damsky testified to the facts set forth below and that these facts shall hereafter have the same effect for the purposes of this litigation as would be afforded any statement of a witness made at a deposition taken pursuant to Rule 30 of the FRCP and sworn to by him.

1. Mr. Irving Damsky is, and, since 1967 has been, in charge of personnel matters for the Department of Social Services for the City of New York (hereafter "the Department").

2. Prior to approximately September, 1971, the regulations of the Department (Informational #68-88 effective Nov. 1, 1968) required all women employees to take a leave of absence commencing no later than the end of their fifth month of pregnancy, and for such further period as to which she secured the Department's medical approval and the approval of the Commissioner of the Department. Approval to work beyond the end of the fifth month up until the end of the seventh month was frequently authorized.

At the time Informational 68-88 was in effect, no written regulations existed which set forth the medical standards under which an extension beyond the fifth month would be granted. However, Departmental policy was to require its physicians to contact the woman's physician to determine his/her views and to

generally be guided thereby.

Neither were their written standards in effect which governed the exercise of the Commissioner's discretion in delaying the leave date assuming medical approval was given. The power to exercise the Commissioner's discretion had been generally delegated to Mr. Damsky. In determining whether to approve the extension Mr. Damsky was normally guided by the medical recommendation alone. Beyond that the decision was based on the kind of work she was doing and its importance to the Department. Very few women, if any, were in fact denied an extension beyond the fifth month if they had medical approval.

3. Under Informational #68-88 requests to delay the commencement of leave beyond the end of the seventh month would be granted provided that there was medical approval and provided that it was unusually important to the Department that she work beyond the end of the seventh month. No extension was permitted beyond the end of the eighth month.

Mr. Damsky knew of only one woman who was granted an extension beyond the end of the seventh month, and she was at the time engaged in a project which only she could complete and which was of great importance to the department.

Pregnant employees were in the ordinary course informed by the Department that extensions beyond the five month limit were available but were not informed in the ordinary course that extensions were available beyond the seven month limit. Very few women ever asked for an extension beyond the seventh month.

4. In or about September 1971, the Department changed its maternity leave policy so that it no longer required a woman to

take maternity leave. Rather, a pregnant employee was permitted to work as long as she was capable and desired to do so. This change of policy was effected shortly after the Department was orally informed by the Human Rights Commission of the City of New York that it was considering issuing a finding that the maternity leave policy previously in effect violated the rights of pregnant women.

5. On or about January 19, 1972 Deputy Mayor Edward K. Hamilton issued a directive to all city agencies suspending the operation of the rules and regulations governing maternity leave. Said directive informed all city agencies that pregnant women should be permitted to continue in their jobs as long as they were capable and desirous of doing so.

6. The City's rules and regulations governing maternity leaves were formally amended effective September 1, 1972, to incorporate said new policy.

7. To Mr. Damsky's knowledge, no pregnant women has suffered harmful phsical effects as a result of the new policy, nor has the efficient operation of the Department suffered in any way.

8. At the time that she was placed on mandatory maternity leave on February 26, 1971 Plaintiff JANE MONELL had the title of Supervisor I, Bureau of Child Welfare. As a Supervisor I she was probably responsible for supervising case workers, but Mr. Damsky was unable to testify as to her exact duties, and could not testify as to whether or not her duties involved any physical hazard or any physically taxing work. Mr. Damsky was unable to testify as to the quality of Plaintiff MONELL'S job performance.

He could find no indication of any kind in her personnel file that her performance was less than satisfactory. Nor could he find any indication in her personnel file that the person or persons responsible for supervising Plaintiff MONELL either requested that she be placed on maternity leave or objected to such action.

Dated: May 16, 1974
New York, New York

OSCAR G. CHASE
Attorney for Plaintiffs

S. M. Gold

Adrian P. Burke
Corporation Counsel of
the City of New York
Attorney for Defendants

By: Margaret G. Gold

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-against-

71 Civ. 3324

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULE M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York; and JOHN V. LINDSAY, as May of the City of New York.

Defendants.

APPEARANCES

Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
Attorneys for Plaintiffs
Nancy Stearns
Oscar G. Chase
Gregory Abbey
Of Counsel

Adrian P. Burke, Corporation Counsel
Municipal Building
New York, N.Y. 10007
Attorney for Defendants
Margaret G. Gold, Assistant Corporation Counsel
Of Counsel

METZNER, D.J.:

This action is brought by female employees of the New York City Board of Education (Board) and the New York City Department of Social Services (Department) on behalf of themselves and other female employees in city agencies similarly situated. Plaintiffs challenge, on constitutional grounds, the rules and regulations of the defendant city agencies which plaintiffs claim arbitrarily compelled pregnant employees to take unpaid leaves of absence when they desired to, and were capable of working beyond the mandatory leave period. Plaintiffs seek declaratory and injunctive relief and damages for back pay.

According to the allegations of the complaint, the individual defendants Sugerman, Scribner and Lindsay are sued in their official capacities.

Jurisdiction is based on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) (the civil rights statute and its jurisdictional counterpart), and 42 U.S.C. §2000(e), et seq.(Title VII, the Equal Employment Opportunity Act).

Judge Motley has previously determined that the suit may be maintained as a class action. 357 F. Supp. 1051 (1972).

Defendants have moved to dismiss the action or, in the alternative, for an order granting summary judgment. They also seek to vacate the order granting class action status to this suit or, in the alternative, to compel plaintiffs to pay for the class action notice if it is ruled that the action proceed as a class action.

Plaintiffs have cross-moved for summary judgment.

The original complaint was filed on July 26, 1971 ith the plaintiffs being Monell, an employee of the Department, and Terrall and Zapata employed by the Board. An amended complaint was filed on September 14, 1972, which added plaintiff Abbey, who was employed by the Board. The amended complaint was filed following the amendment to Title VII permitting actions against governmental agencies charged with discrimination in employment. The record shows that each of the four plaintiffs was directed to take maternity leave about a month before the date that their respective doctors would have ordered.

In the fall of 1971, the Department changed its maternity leave policy to provide that no woman need report her pregnancy or take maternity leave as long as

she is able to continue to perform her job and desires to do so. This policy change was ordered effective in all city agencies, including the Department, on January 19, 1972, by a directive from former Deputy Mayor Edward K. Hamilton.

The Board of Education of the City of New York similarly changed its bylaws effective September 1, 1973.

These changes, while made subsequent to the institution of this action, antedated the decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), which would hold the practices complained of here to be unconstitutional. Consequently, the claims for equitable relief by way of injunction or declaratory judgment are moot. See, Galvan v. Levine, 480 F.2d 1235 1261 (2d Cir. 1973), cert. denied, 417 U.S. 966 (1974), Nieves v. Oswald, 496 F.2d 808,813 (2d Cir. 1974).

We are left then with claims for back pay covering the periods for which plaintiffs allege they could have worked after being forced to take maternity leave.

The holding in City of Kenosha v. Bruno, 412 U.S. 507 (1973) supports a ruling that an action under

Section 1983 will not lie against either the Board or the Department for any relief. Plaintiffs place great reliance on Forman v. Community Services, Inc., 500 F.2d 1246, 1254 (2d Cir.1974), cert. granted, 43 U.S.L.W. 3403 (U.S. Jan. 21, 1975) (No. 647), as authority for the proposition that the Board is not immunie to an action under that Section. That case is not in point since the statute creating the State Housing Authority specifically waived governmental immunity both as to the agency and the state.

Under the Eleventh Amendment which precludes any action by a citizen against a state, it has been held that a state officer aued in his governmental capacity may be enjoined from future action that may be violative of the Constitution. Edelman v. Jordan, 415 U.S. 651, 664(1974); McMillen v. Board of Education of State of New York, 430 F.2d 1145,1148-49(2d Cir. 1970). However, the Court went on to hold that monetary damages, even if characterized as "equitable restitution," may not be awarded for past injury if they are to be paid from the state treasury. Such an action runs afoul of the Eleventh Amendment. Edelman, supra,at 664-71. See also,Rothstein

v. Wyman, 467 F.2d 226, 236 (2d. Cir. 1972), cert. denied, 411 U.S. 921 (1973).

The same reasoning applies to the effort to recover back pay in this 1983 action. Monroe v. Pape, 365 U.S. 167 (1961), holds that an action for damages may not lie directly against the municipality. This immunity cannot be circumvented by suing the mayor, the commissioner or the administrator in their official capacities. Any award that would be made would, in the last analysis,be paid by the City of New York. Patton v. Conrad Area School District, 388 F. Supp. 410, 417 (D.Del. 1975); Needleman v. Bohlen, 336 F. Supp. 741 745-46 (D. Mass. 1974); Hines v. D'Artois, 383 F. Supp. 184, 189-90 (W.D. La. 1974); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1973).

I reach this result fully aware that in Cohen v. Chesterfield County School Board, decided with Cleveland Board of Education v. LaFleur, supra, the district court had granted a judgment for back wages as well as equitable relief. The Court did not indicate the existence of any jurisdictional problems under 1983 either because a board of education was a defendant, as were individuals

being sued in their official capacities, or because of the nature of the relief sought. This is in contrast to the sensitivity indicated by the Court in Kenosha, supra, where only municipalities were defendants and the Court on its own motion raised the jurisdictional objection that Section 1983 did not create the right of action for any purpose against such defendants.

We turn now to the claim for relief under Title VII. Prior to March 24, 1972, governmental units were exempt from the operations of Title VII. On that date Public Law 92-261 was enacted which amended Section 2000e(b) so that Title VII relief was available to employees of such governmental units.

As indicated above, this complaint was filed in 1971. In Cleveland Board of Education, supra, at 638-39 n.8. the Court said:

> "At the time that the teachers in these cases were placed on maternity leave, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e et seq., did not apply to state agencies and educational institution. 42 U.S.C. §§2000e(b) and 2000(e)-1. On March 24, 1972, however, the Equal Employment Opportunity Act of 1972 amended Title VII to withdraw those exemptions. Pub. L. 92-261, 26 Stat. 103. Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination

> policy for pregnant women presumptively violates Title VII. 29 CFR §1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future."

This expression of opinion by the Court is dispositive of the issue of retroactivity in this case. The amendment of the complaint by adding plaintiff Abbey does not change the result since the discrimination as to her occurred and was completed prior to the amendment of the statute. Place v. Weinberger, 6 E.P.D. 9010 (E.D.Mich. 1973), aff'd 497 F.2d 412 (6th Cir. 1974), cert. denied, 43 U.S.L.W. 3306 (U.S. Nov. 26, 1974).

The claim for relief pursuant to Title VII is dismissed.

The complaint is dismissed.

So ordered.

Dated: New York, N.Y.
April 30, 1975

CHARLES M. METZNER
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE MONELL, et al.,
Plaintiff,

v.

DEPARTMENT OF SOCIAL SERVICES
OF THE CITY OF NEW YORK, et al.,
Defendant.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 71 Civ. 3324

JUDGE METZNER

INDEX TO THE RECORD ON APPEAL

INDEX TO THE RECORD ON APPEAL (continued)

INDEX TO THE RECORD ON APPEAL (continued) DOCUMENTS